Supreme Court, U. S.
FILED
NOV 20 1975

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

TABLE OF CONTENTS

	Page
General Docket, United States Court of Appeals for the Fourth Circuit	1
Civil Docket, U. S. District Court	5
Complaint for Damages and Equitable Relief	9
Motion to Dismiss for Lack of Jurisdiction	29
Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce	31
Plaintiff's First Amendment to Complaint	34
Amendment to Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce	39
Excerpt from Brief in Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction	41
Excerpts from Transcript of Oral Argument before the Honorable Franklin T. Dupree, Jr.	42
Order Dismissing the Action	46
Opinion, United States Court of Appeals for the Fourth Circuit (filed February 6, 1974)	49
Order, United States Court of Appeals for the Fourth Circuit (filed June 11, 1974)	51
Opinion, United States Court of Appeals for the Fourth Circuit (filed February 18, 1975)	52

GENERAL DOCKET

United States Court of Appeals
for the Fourth Circuit

Case No. 73-1627

Appeal From the United States District Court for the
Eastern District of North Carolina, at Raleigh

Date		Filings—Proceedings
1973		
May	25	Record on appeal in one volume (Vol. I) filed and appeal docketed.
May	25	Transcript of Motions heard before Judge Dupree on 2/22/73 in one volume (Vol. II) filed.
June	4	Memorandum in support of Motion to dismiss Complaint and Brief in Opposition to defendants motions to dismiss (Supplement to record on appeal) received from the clerk of the district court at Raleigh, N. C.
June	5	Appearance for the appellant filed and entered.
June	5	Appearance for the appellees filed and entered.
June	5	Appearance for the appellees filed and entered.
June	8	Appearance for the appellant filed and entered.
June	8	Appearance for the appellees filed and entered.
July	3	Motion of the Federation of American Hospitals for leave to file amicus brief and affidavit of Lawrence E. Mindell in support thereof filed. Motion granted.

July 3 Twenty-five (25) copies of amicus brief in support of the appellant filed.

July 5 Twenty-five (25) copies of the appellant's brief filed.

July 5 Ten (10) copies of the appellant's appendix filed.

July 16 Appellee's motion to vacate the grant of leave to file an amicus curiae brief and alternatively to strike extra-record evidence contained therein filed.

July 23 Memorandum in opposition to appellees' motion to vacate leave to file an amicus curiae brief and alternatively to strike extra-record evidence contained therein filed.

July 23 Order denying appellees' motion to vacate the grant of leave to file an amicus curiae brief filed.

July 23 Memorandum in opposition to motion of appellees to vacate the grant of leave to file an amicus curiae brief and alternatively to strike extra-record evidence contained therein filed by the "Federation".

July 30 Twenty-five (25) copies of the appellant's brief filed.

Aug. 6 Twenty-five (25) copies of the appellee's brief filed.

Aug. 6 Twenty-five (25) copies of the appellee's brief (for Stockbridge) filed.

Aug. 22 Twenty-five (25) copies of the appellant's reply brief filed.

Nov. 14 Notice of oral argument mailed to Jordan, Train, Perry, Mindell, Steed, Bolze, and Anderson.

Dec. 6 Cause argued before Bryan, Winter, and Widener, Circuit Judges, and submitted.

Dec. 7 Appearance for the appellees filed and entered.

1974

Feb. 6 Per curiam opinion filed. (HLW)

Feb. 6 Opinion and clerk's memorandum mailed to counsel of record. (Copy of opinion mailed to the clerk of the district court.

Feb. 6 Judgment of the district court affirmed. Judgment filed.

Feb. 13 Record of appeal in two volumes and supplement to record sent to Judge Blatt's office. They are to return it to district court in Raleigh.

Feb. 15 Appellee's verified bill of costs filed.

Feb. 20 Petition for rehearing and suggestion for rehearing en banc filed.

Mar. 1 Record on appeal returned by Judge Blatt's office to the Clerk of the District Court at Raleigh, N. C.

June 3 Supplemental motion for rehearing and request for hearing en banc filed.

June 11 Order granting the request that the case be reheared in banc filed. (foc)

Sept. 16 Twenty-five (25) copies of the appellee's brief for Stockbridge filed. wc

Sept. 16 Twenty-five (25) copies of the appellee's brief filed. (wtc) Supplemental.

Sept. 17 Twenty-five (25) copies of the appellant's supplemental brief filed. wtc

Oct. 3 Cause argued en banc before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, Winter, Craven,

Butzner, Russell, Field and Widener, Circuit Judges, and submitted. (wu)

1975

Feb. 18 Opinion filed. JBC Judges Winter, Butzner and Field dissenting. (wu)

Feb. 18 Opinion and Clerk's Memorandum mailed to counsel of record and the Clerk of the District Court at Raleigh, North Carolina. (wu)

Feb. 18 Judgment of the District Court affirmed. Judgment filed. (wu)

Feb. 27 Appellee's verified bill of cost filed. (foc)

Mar. 11 Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Raleigh, N. C. (jhl) (record returned 3/1/74)

May 28 Notice evidencing the filing petition for writ of certiorari in the Supreme Court May 19, 1975 filed. (No. 74-1452)(jhl)

Oct. 17 Certified copy of order of the Supreme Court granting certiorari October 6, 1975 filed. (jhl)

In the United States District Court for the Eastern District of North Carolina

Hospital Building Company, Plaintiff,

v.

Trustees of the Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr., Defendants.

Civil Action No. 4048

DOCKET ENTRIES

Date	Proceedings
1972	
Oct. 10	Fil. and ent. Cash Bond for Costs in amt. of $200.00. Fil. and ent. Complaint—Count I: Plff. prays that Court adjudge and decree that defts. have engaged in unlawful combination and conspiracy in vio. of Sec. 1 of Sherman Act (15 U.S.C.); that plff. recover 3 times damages determined to have been sustained, at least amt. of $2,401,956.00 and that joint and several judgments be entered against defts. for amts. determined; that ea. deft., their successors, etc. be enjoined and restrained from continuing, maintaining or renewing conspiracy etc. and that plff. recover costs w/reasonable attys.' fees. Count II: Plff. pray that Court adjudge and decree deft. Rex has engaged in unlawful attempt to monopolize and to conspire w/others to monopolize in vio. of Sec. 2 of Sherman Act; that plff. recover 3 times damages determined sustained, at least amt. of $2,401,956

and judgment be entered against deft Rex for amt. determined; that deft. Rex, its successors, etc. be enjoined and restrained from continuing to attempt to monopolize or conspire to do so; that plff. recover costs together w/reasonable attys.' fees. 4 cc to U.S.M.

Issued Summons and Complaint to U. S. Marshal—Orig. and 4 cc to U.S.M.

Oct. 17 Fil. and ent. U. S. Marshal's Return on Summons and Complaint: Theron A. Upchurch, Chairman of Be. of Trustees of Rex, served 10/11/72 at 2610 Wycliff Rd., Raleigh, NC. Joseph Barnes served 10/11/72 at Rex Hosp., corner of Wade Ave. and St. Mary's St., Raleigh, NC. George Stockbridge served by service upon his sect. Mrs. Nancy Dillinger, Home Security Bldg., Durham, N.C. Richard Urquhart, Jr. served by service upon his sect., Helen M. Howard, 4300 Six Forks Rd., Raleigh NC. Stockbridge and Urquhart served 10/11/72.

Oct. 30 Fil. and ent. Stipulation and Consent Order Extending Time within which defts. may respond to complaint to and including 11/30/72. (Jr Whitty, Clk., by JW Todd, Dpty) (Civ.O.B.No.24,P.8022) 1 cc to Thomas W. Steed, Jr.

Dec. 1 Fil. and ent. Stipulation and Consent Order Extending Time within which defts., may answer or otherwise plead to complaint to and including 12/30/72. (Dupree, J.) (Civ.O.B.No.25,P.8097) CC to counsel.

Dec. 29 Fil. and ent. Motion to Dismiss for Lack of Jurisdiction Pursuant to Rule 12(b)(1)(2) and for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b)(6), by deft. George Stockbridge w/Cert. of Ser.

1973

Jan. 2 Fil. and ent. Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce by defts. Trustees of the Rex Hospital, Joseph Barnes and Richard Urquhart, Jr.

Fil and ent. Memorandum in Support of Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce w/Cert. of Ser. as to Motion and Memorandum.

Jan. 5 Fil. and ent. Certificate of Service as to Motion to Dismiss filed by defts., Rex Hospital, Joseph Barnes and Richard Urquhart, Jr.

Jan. 16 Fil. and ent. Brief in Support of Defendant Stockbridge's Motion to Dismiss Complaint Pursuant to Rule 12(b). w/Cert. of Ser.

Jan. 19 Set for hearing on Motion to Dismiss at Raleigh, 2:30 p.m., Thurs., 2/22/73. Cy. to counsel, Judges and Ct.Rptr.

Fil. and ent. Stipulation and Consent Order Extending Time within which plff. may file responsive brief, affidavit or other document in response to motions of defts. to dismiss action to and including 1/29/73. (Dupree, J.) (Civ.O.B.No.25,P.8254)

Jan. 19 Set for hearing on motion to dismiss at Raleigh, 2:30 P.M., 2/22/73 in Ctrm. No. 1. Cy. to counsel, Ct. Rptr., and Judges.

Jan. 29 Fil. and ent. Plaintiff's First Amendment to Complaint w/Cert. of Ser.

Fil. and ent. Brief in Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction w/Cert. of Ser.

Feb. 20 Fil. and ent. Amendment to Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce w/Cert. of Ser.

Fil. and ent. Reply Brief in Support of Motion to Dismiss Complaint (with Amendment) for Lack of Requisite Effect Upon Interstate Commerce.

Feb. 28 Fil. and ent. Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss w/Cert. of Ser.

Mar. 5 Fil. Defendants' Supplemental Brief Re Motion to Dismiss w/Cert. of Service attached, 1 copy. (Ent. 3/6/73)

Mar. 23 Fil. and ent: Order—that motions of defts. to dismiss for lack of subject matter jurisdiction and the failure of the complaint, as amended, to state a claim upon which relief can be granted are allowed and the action is dismissed. (Dupree, J.) (Civ.O.B.No.25,P. 8445) CC to Jordan, Steed, Mount and Anderson (Ent. 3/27/73)

Apr. 13 Fil. and ent. Notice of Appeal by plff. All counsel served and advised of rules governing appeals. Cy. to Ct. Rptr.

Fil. and ent. Bond for Costs on Appeal in amt. of $250.00—Maryland Cas. Co., Surety.

Apr. 23 Fil. and ent. Transcript of Motions heard before Hon. F. T. Dupree, Jr., at Raleigh, N.C., 2/22/73. (1-39 pgs.—Elizabeth Overby, Ct. Rptr.)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

(Filed October 10, 1972)

Plaintiff, Hospital Building Company, a corporation organized under the laws of North Carolina, brings this civil action against defendants in order to recover damages sustained by plaintiff due to the actions of defendants and their co-conspirators as are more fully alleged hereinafter, which actions constitute (1) a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and (2) an attempt to monopolize in violation of Section 2 of the Sherman Act, and to enjoin defendants and their co-conspirators from any further such action. For its complaint, plaintiff alleges:

COUNT I

Jurisdiction and Venue

1. Plaintiff brings this action under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover treble the amount of damages incurred by plaintiff as a result of violations by the defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1 and § 2) and under Section 16 of the Clayton Act (15 U.S.C. § 26) to secure equitable relief against a continuation of those violations. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1337.

2. The defendant corporation named in this complaint transacts business and has its home office in the Eastern District of North Carolina. The individual defendants reside in said District or elsewhere in the State of North Carolina. The unlawful activities done pursuant to the contracts, agreements, conspiracy and course of conduct herein alleged were and are carried out, in substantial part, within the Eastern District of North Carolina, and the interstate trade and commerce hereinafter described was and is carried on within the Eastern District of North Carolina. Venue as to each defendant is properly laid in the Eastern District of North Carolina pursuant to Section 4 of the Clayton Act (15 U.S.C. §§ 15, 22), 28 U.S.C. § 1391(b) and 1392(a).

Parties

3. Plaintiff, Hospital Building Company, is a corporation organized for profit under the laws of the State of North Carolina, with its principal office and place of business in Raleigh, North Carolina. Plaintiff operates Mary Elizabeth Hospital, located in Raleigh, North Carolina, a proprietary hospital offering general medical-surgical hospital services to the public. Plaintiff has been injured in its business and property by the contracts, agreements, conspiracy and course of conduct herein described and brings this action on its own behalf.

4. Defendant Trustees of Rex Hospital, a Corporation ("Rex"), is a corporate body organized pursuant to the laws of the State of North Carolina. Rex operates Rex Hospital, a private, tax exempt hospital which offers general medical-surgical hospital services to the public in Raleigh, North Carolina. The principal place of business of Rex is located in Raleigh, North Carolina.

5. Defendant Joseph Barnes is Administrator of Rex Hospital, and resides at 4821 Rembert Drive, Raleigh, North Carolina.

6. Defendant George Stockbridge is Executive Secretary of the Health Planning Council for Central North Carolina, and resides at 3912 Brickston Lane, Durham, North Carolina.

7. Defendant Richard Urquart is a member of the Board of Trustees of Rex and resides at 1021 Marlowe Road, Raleigh, North Carolina.

8. Various persons not made defendants herein have combined and conspired with the named defendants in the violations hereinafter alleged, and have performed acts and otherwise contributed to the furtherance thereof. Plaintiff names the following persons as co-conspirators, named herein as such but not as defendants. Plaintiff reserves the right, pursuant to the Federal Rules of Civil Procedure, to amend its complaint to add as defendants those persons named as co-conspirators herein and any other persons whose participation in the aforesaid combination and conspiracy is not presently known to plaintiff but whose participation becomes known to plaintiff at a later date. Other persons presently known by plaintiff to have participated in the combination and conspiracy are the following:

(a) Wake County Hospital System, Inc ("Wake"), an authority organized under the laws of the State of North Carolina and which operates Wake County Memorial Hospital in Raleigh, North Carolina;

(b) William F. Andrews, Sr. ("Andrews"), Executive Director of Wake, and Administrator of Wake County Memorial Hospital;

(c) Dr. I. B. Holley ("Holley"), a former chairman and presently a member of the Health Planning Council for Central North Carolina;

Definitions

9. As used in this complaint, the term "Raleigh area" means the area comprising Wake County, in the State of North Carolina.

10. As used in this complaint, the term "medical-surgical hospital" means a hospital staffed and equipped to handle patients in need of short-term medical treatment or surgery, and which offers surgical, X-ray, laboratory, nursing and various other services.

11. As used in this complaint, the term "paid hospital" means any medical-surgical hospital which charges any of its patients a fee or other charge for rendering services to such patient, regardless of whether some other patients are treated on a charitable basis. "Paid hospital business" means the business generated by payment of such fees by patients or third parties on their behalf.

Nature of Trade and Commerce

12. Medical-surgical hospitals play an essential role in providing medical and surgical care to persons in need of short-term medical treatment or surgery. Generally speaking, such hospitals are organized and established in one of three ways. "Proprietary" hospitals are owned and operated by private individuals or corporations in the same general manner as any other private business (giving due regard to the special functions served by a hospital), and are operated for profit. So-called "not-for-profit" hospitals are operated and established by private corporations usually organized under special state laws for non-profit corporations; while such corporations are not operated for profit in the sense that profits are distributed to any persons beyond the corporation, nevertheless, such corporations are dependent, for the most part, for their continued

existence upon earnings derived from the hospital's operation, and none of such earnings are remitted to federal and state governments as taxes. "Government" or "public" hospitals are typically established and operated by public or semi-public corporations organized under special state laws. Government hospitals are usually paid hospitals, insofar as some or all of their patients are concerned, but the payments received for a substantial number of such patients are from government programs. Hospitals of each of the three kinds compete with one another for paid hospital business in a community, regardless of their differing forms of organization.

13. Persons whose physical condition requires the services offered by medical-surgical hospitals, and who are able to arrange, directly or indirectly through a third party such as Blue Cross, a private insurance company, or a governmental program, for payment of fees for those services charged by paid hospitals, choose the hospital from which they will receive such services. The choice of such hospital is often governed by the identity of the physician who will be in charge of the person's care while hospitalized, but since most such physicians are on the staff of more than one hospital, there is, as a practical matter, open competition among paid hospitals regardless of form for the patronage of persons desiring medical-surgical services from hospitals. Thus, Hospital Building Company, through the operation of Mary Elizabeth Hospital, competes directly with Rex Hospital, Inc (Rex Hospital) and Wake County Hospital System, Inc. (Wake County Memorial Hospital) for the paid hospital business in the Raleigh area.

14. Hospital Building Company, in the course of its business of operating Mary Elizabeth Hospital, has purchased, and will continue to purchase in the future, a substantial amount of goods, including supplies and medicines from suppliers located in states other than North Carolina. Hospital Building Company regularly utilizes interstate communications including the mails,

telephone, telegraph, to carry on its business. A substantial number of persons coming to the Raleigh area for treatment in the medical-surgical hospitals there reside in states other than the State of North Carolina. Hospital Building Company, through Mary Elizabeth Hospital, competes for the paid hospital business of these persons. In the case of many patients at Mary Elizabeth Hospital, and at the other two paid hospitals in the Raleigh area, payment of the fees charged by the hospital is made by insurance companies and other providers located outside of the State of North Carolina. The combination and conspiracy complained of herein is directed, among other things, at plans of Hospital Building Company to relocate Mary Elizabeth Hospital into a new, enlarged hospital facility which would be constructed, in large measure, from goods and supplies purchased in states other than the State of North Carolina. Financing of the expansion at which the combination and conspiracy are aimed would be accomplished through arrangements with a lender located outside the State of North Carolina. The combination and conspiracy complained of herein thus has a substantial and direct effect on interstate commerce.

Offenses Alleged

15. Beginning at least as early as 1970, the exact date being unknown to plaintiff, and continuing thereafter up to and including the date of filing of this complaint, the defendants have, together with their co-conspirators in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid trade and commerce in the furnishing of medical-surgical hospital services and have maintained contracts and agreements in unreasonable restraint of such trade and commerce.

16. Said violations have consisted of continuing contracts, agreements, understandings, concert of action and course of

conduct among defendants and the co-conspirators to do, among other things, the following:

(a) fix, maintain and allocate the number of paid hospital beds in medical-surgical hospitals in the Raleigh area so that substantially all of said beds, and thus the capacity to offer medical-surgical hospital services would be artificially controlled by Rex and Wake, (i) in order to prevent plaintiff from serving the public need for such medical-surgical hospital beds, and (ii) in order that Rex and Wake could maintain the number of medical-surgical hospital beds in the Raleigh area at artificially low, non-competitive levels until such time as such defendants could increase the number of beds on a schedule suitable to them, with the result that said defendants could maintain and fix the price to patients of medical-surgical hospital services at artificially high, non-competitive levels;

(b) otherwise allocate customers and submarkets in such trade or commerce among themselves;

(c) foreclose the market for paid hospital business as against plaintiff and prevent plaintiff from competing for an expanded share of such market; and

(d) not compete in such trade or commerce.

17. The incidents of the conduct herein described include, among others including incidents not known to plaintiff at this time, the following:

(A) Rex and Wake caused to be formed in January, 1970, a purported public interest committee ("The Joint Long Range Hospital Planning Committee") to study and make recommendations concerning the provision of medical-surgical services by hospitals in the Raleigh area. In reality, the sole purpose of the aforesaid committee was to attempt to mask the combination and conspiracy already entered into among the defendants and co-conspirators whereby the market for paid hospital business

for medical-surgical hospitals would be allocated by and between Rex and Wake, to the exclusion of plaintiff. In furtherance of the aforesaid conspiracy, defendant Urquart was made a member of the aforesaid committee, and defendants Barnes and Stockbridge, and co-conspirator Andrews were made ex-officio members of the committee. Barnes, Stockbridge and Andrews played a significant and controlling role in preparation of the committee's report, which report endorsed the ultimate objective of the aforesaid conspiracy. Since its publication, the report has been utilized as a device to further the ends of the conspiracy. At all times, the defendants and co-conspirators intentionally concealed from the other members of the committee, who did not participate in the combination and conspiracy, the true purpose of the formation of the committee.

(B) Thereafter, upon enactment by the Legislature of the State of North Carolina of the "Certificate of Need Law" (Gen. Stat. § 90-291, N.C. Session Laws, Chapter 1164, ratified July 1, 1971), the defendants and co-conspirators caused the Health Planning Council for Central North Carolina to become a means for carrying out the above-described combination and conspiracy. The North Carolina Certificate of Need Law requires that, prior to the construction of any additional medical-surgical hospital beds, a Certificate of Need from the North Carolina Medical Care Commission be obtained by the party proposing to construct such medical-surgical hospital beds. The statute contemplates that the Medical Care Council will receive from a local agency "recommendations" respecting any request for such a certificate. Although such recommendations are not binding on the Commission, the ability of an applicant to obtain a fair hearing before the local agency on its request and to obtain a recommendation based on the merits of such request is important to an applicant both in terms of the possibility of ultimate success before the Medical Care Commission and in terms of the ability of the applicant speedily to process its application to the Medical Care Commission. It was the purpose and

intent of the defendants and co-conspirators that, as the agency empowered to make "recommendations," the Health Planning Council would act in accordance with the scheme of the defendants and co-conspirators to allocate the market and restrain competition as described above. It was at all times the intent of the defendants and co-conspirators to deny to plaintiff fair and effective access to the Health Planning Council, and to utilize the Council on behalf of the combination and conspiracy alleged herein to:

(1) defeat any application of plaintiff to the Medical Care Commission for a Certificate of Need approving construction of additional medical-surgical hospital beds by plaintiff,

(2) take all possible steps to secure for Rex and Wake Certificates of Need approving construction, from time to time according to the schedule of the conspiracy, of additional medical-surgical hospital beds for those hospitals at such time and in such amounts as would prevent and preclude plaintiff from constructing additional medical-surgical beds, and

(3) in the event the defendants and co-conspirators failed in denying plaintiff a Certificate of Need for the construction of additional medical-surgical hospital beds, then to take all steps necessary to prevent plaintiff from utilizing its Certificate of Need by whatever means possible, including baseless and unwarranted actions before courts, county and municipal authorities and other administrative agencies in the name of the Council.

As Executive Director of the Health Planning Council, defendant Stockbridge was the agent of the combination and conspiracy in utilizing the Health Planning Council for these purposes and defendant Stockbridge has in fact acted as the agent of the conspiracy in denying plaintiff effective access to the Health Planning Council and in causing the Health Planning Council to take the steps alleged herein in furtherance of the

combination and conspiracy. Co-conspirator Holley acted with Stockbridge in causing the Council to take the actions alleged herein in furtherance of the combination and conspiracy, with full knowledge of the ends of the combination and conspiracy and with malicious intent to damage plaintiff.

(C) Pursuant to North Carolina law, plaintiff, on November 4, 1971, presented its application for the construction of 91 additional medical-surgical beds (which beds would be constructed in addition to plaintiff's existing number of beds in a relocated hospital facility) in the Raleigh area to the Medical Care Commission for consideration and a copy of the application was sent to the Health Planning Council for review. Defendant Stockbridge, acting as agent of the combination and conspiracy, thereupon undertook a series of actions designed to, and which had the effect of, denying plaintiff fair access to the deliberations of the Health Planning Council and with the further goal of denying plaintiff fair access to the deliberations of the North Carolina Medical Care Commission. Although defendant Stockbridge well knew that he and the other defendants and co-conspirators named in this paragraph would cause the Health Planning Council to recommend rejection of plaintiff's application, defendant Stockbridge represented that plaintiff could receive a fair hearing before the Council. Plaintiff undertook to comply with each and every procedural demand made upon it by defendant Stockbridge, allegedly on behalf of the Council (even though the Health Planning Council had no formal procedural standards), which procedural demands were made solely to harass and frustrate plaintiff. Defendant Stockbridge, as agent of the combination and conspiracy and with the active, though unrevealed, assistance of Rex and defendant Barnes, and co-conspirator Holley, purported to establish various substantive standards which he pretended plaintiff should agree to meet if its application were to receive a favorable recommendation by the Health Planning Council, even though

defendant Stockbridge, and defendants Rex and Barnes well knew that the purported standards had no basis in law (and, in fact, plaintiff's agreement to several of them would have constituted violations of the laws of North Carolina and of the United States). Defendant Stockbridge and the other defendants and co-conspirators named in this paragraph knew at all times that they would cause the Health Planning Council to recommend that plaintiff's application be denied. Plaintiff was never allowed to raise before the Health Planning Council the legality or relevance of the purported "standards," was not given the chance to make a presentation of its case to the Health Planning Council, nor was plaintiff allowed to cross-examine or otherwise investigate the accuracy of the opposition filed by defendant Rex and co-conspirator Wake to plaintiff's application. For these and other reasons, plaintiff was completely denied a fair hearing by the Health Planning Council and thus completely denied fair access to that body and a chance to have its application considered on the merits. As a direct result of the conspiracy, therefore, the Health Planning Council subsequently recommended to the North Carolina Medical Care Commission that plaintiff's application be denied. Such unfounded adverse recommendation was intended to, and did, delay and forestall the capacity of plaintiff to compete effectively in the Raleigh area.

(D) On February 22, 1972, the North Carolina Medical Care Commission, through its duly authorized hearing examiner, held a hearing on the application of plaintiff for the construction of 91 additional medical-surgical beds in the Raleigh area. (The State of North Carolina estimates that an additional 409 medical-surgical beds are needed in the Raleigh area.) Plaintiff appeared and presented its case. The Health Planning Council appeared in opposition to plaintiff's application, nominally on its own behalf, but in reality on behalf of the combination and conspiracy.

(E) After the February 22 hearing, the defendants and co-conspirators took further steps designed to prevent plaintiff from effective access to the procedures and deliberations of the Medical Care Commission, and to delay processing of plaintiff's application for Certificate of Need to the damage of plaintiff, as follows:

(i) Defendant Rex, even though it was present at the hearing and had an opportunity to participate therein, did not appear formally at the hearing but later demanded to appear as a protestant of record and become a formal party to the proceedings, for the sole purpose of preventing and delaying approval of plaintiff's application by the Medical Care Commission.

(ii) Defendant Rex thereafter sought, by letter to the Medical Care Commission, in bad faith further to delay the processing and approval of plaintiff's application.

(iii) Even though it had had full and fair opportunity to present such evidence as it might have deemed appropriate at the February 22 hearing, the Health Planning Council in bad faith requested a rehearing on plaintiff's application.

(iv) In a bad faith attempt to delay action of the Medical Care Commission, co-conspirator Wake, though it had formally withdrawn as a party on April 4, 1972, in June, 1972, in order to further the combination and conspiracy, requested that it be made a party of record solely to ask for a further delay of then scheduled further hearings.

(v) As a result of the bad faith actions of the Health Planning Council, further hearings were held on June 12, 1972, by the duly authorized hearing examiner on the North Carolina Medical Care Commission. At that time, the Health Planning Council and defendant Rex introduced further purported evidence, in a baseless attempt to oppose the application of plaintiff. As was well known to both the Health Planning Council and to Rex, the evidence submitted was without probative value and

was submitted solely for the purpose of denying plaintiff effective access to the procedures and deliberations of the Medical Care Commission and to delay the approval of plaintiff's application, to the damage of plaintiff. At the June 12, 1972, hearing, though the same was nominally in response to the request of the Health Planning Council to hear further evidence in support of the Health Planning Council's recommendation, attorneys for Rex appeared and introduced the purported evidence in the name of the Health Planning Council. At least one witness called to testify, though nominally called on behalf of the Health Planning Council, admitted on cross-examination that the expenses of his firm were being paid by Rex.

(vi) In spite of the grant by the Medical Care Commission of the additional hearing described above, defendant Stockbridge, on June 22, 1972, sought further delay on a final decision by the North Carolina Medical Care Commission which decision, on the basis of the record established on February 22, 1972, and June 12, 1972, could only be favorable to the plaintiff.

(F) Notwithstanding the illegal efforts in furtherance of the conspiracy by the defendants and co-conspirators to deny plaintiff a fair and effective access to the North Carolina Medical Care Commission, that Commission, on the basis of the record established at its hearings and in accordance with North Carolina law, granted to plaintiff on June 30, 1972, a Certificate of Need approving construction of an additional 91 medical-surgical hospital beds in the Raleigh area. At this point, even though plaintiff had suffered substantial damages as a result of the unwarranted and baseless opposition to its application for a Certificate of Need by the combination and conspiracy, plaintiff was prepared to move forward with its construction of such additional medical-surgical hospital beds in order to serve the needs of the public in the Raleigh area. In reliance upon its known compliance with the North Carolina law, and later in specific reliance upon the Certificate of Need issued by the

Medical Care Commission pursuant to the North Carolina laws, plaintiff had as of June 30, 1972, caused to be expended substantial sums of money and the time of its personnel in planning and arranging for the construction of the additional medical-surgical hospital beds contemplated by its application to the Medical Care Commission.

(G) However, since the issuance of the aforesaid Certificate of Need to plaintiff, the defendants and co-conspirators have continued their combination and conspiracy and have taken further steps to effect the goals of that conspiracy and will continue to take such steps unless restrained by this Court.

(H) On or about May 4, 1972, Rex, in accordance with the terms of the combination and conspiracy as revealed in the report of the purported "Joint Long Range Planning Committee" filed for a Certificate of Need covering the construction of an additional 109 medical-surgical hospital beds. The Health Planning Council received this application on May 4, 1972. No hearings were ever held by the Health Planning Council of which plaintiff had notice on the said application of Rex. Upon information and belief, Rex was not required to present evidence to the Health Planning Council in response to the purported substantive and procedural standards purportedly applied to the application of plaintiff. Rather, in furtherance of the conspiracy, the application of Rex was given expedited treatment and the Health Planning Council thereafter, at a time unknown to plaintiff, forwarded to the North Carolina Medical Care Commission a recommendation that the application of Rex be approved. Subsequent to the filing by plaintiff of its application to the North Carolina Medical Care Commission, that Commission had amended its procedures to provide for approval of an application for a Certificate of Need without hearing where such application was not "apparently contested" and on July 20, 1972, the Medical Care Commission issued to Rex a Certificate of Need.

(I) In addition, and in furtherance of the goals of the combination and conspiracy, on July 28, 1972, the Health Planning Council filed in the Superior Court of Wake County an appeal from the decision of the Medical Care Commission granting to plaintiff a Certificate of Need. This purported action is without basis in law or in fact, and is filed in bad faith solely for the purpose of harassing and damaging plaintiff and to prevent plaintiff from proceeding pursuant to the Certificate of Need granted by the Medical Care Commission to construct the additional medical-surgical hospital beds authorized by that certificate. Although the defendants and co-conspirators well know that the grant of the Certificate of Need to plaintiff by the Medical Care Commission is authorized, and indeed required, by North Carolina law and by the facts adduced at the hearings before the Medical Care Commission, they have caused the Health Planning Council through defendant Stockbridge as their agent to file this baseless appeal. The purported appeal is nothing more than a continued incident and an overt manifestation of the combination and conspiracy alleged herein.

(J) It is the obvious intention of the defendants and co-conspirators to maintain their combination and conspiracy, and to continue to take other actions pursuant thereto, designed to accomplish the goals of the conspiracy and to prevent plaintiff from constructing medical-surgical beds which it is entitled to construct pursuant to the Certificate of Need duly issued to plaintiff by the North Carolina Medical Care Commission.

(K) Throughout the duration of the combination and conspiracy referred to herein, the defendants and co-conspirators have attempted to further the goals of the said combination and conspiracy by continued joint efforts to create publicity adverse to plaintiff and by seeking to influence both the public and various private persons and organizations to accede to the goals of the conspiracy by publishing false and malicious information concerning plaintiff and the public need for the

medical-surgical hospital beds proposed to be constructed by plaintiff. In addition, the defendants and co-conspirators have issued misleading publicity concerning both the intentions and the ability of Rex and Wake to meet the clear and pressing needs of the Raleigh area for additional medical-surgical beds. The defendants and co-conspirators are well aware that plaintiff is ready, willing and able to provide additional medical-surgical beds for the Raleigh area, while defendant Rex and co-conspirator Wake are unable to supply medical-surgical beds as quickly as can plaintiff, and well know that plaintiff will supply such medical-surgical hospital beds at no cost to the public for their construction. Nevertheless, defendant Rex and co-conspirator Wake have arranged for misleading publicity to the effect that they were prepared to construct such additional medical-surgical beds in the near future. The sole purpose of the public and private communications of the defendants and co-conspirators concerning plaintiff is maliciously to damage plaintiff in furtherance of the combination and conspiracy, and the sole purpose of the misleading publicity concerning the purported undertakings of Rex and Wake has been to further the goals of the combination and conspiracy alleged herein, and to irreparably damage plaintiff.

(L) The acts described in this paragraph do not constitute all of the incidents of the combination and conspiracy. Certain incidents have been willfully concealed by the defendants and co-conspirators. Plaintiff reserves the right to prove at trial all of the incidents of the combination or conspiracy, whether or not alleged herein.

Effects

18. The effects of the aforesaid combination and conspiracy have been, are, and will be, among others, to prevent and restrain competition in the furnishing of additional medical-

surgical hospital services to the public with the consequences that (1) the public need for such additional medical-surgical beds will not be met, (2) due to a continuing shortage of medical-surgical beds, the fees charged to the public will be maintained at artificial and non-competitive levels, and (3) there will be a substantial adverse effect on the interstate commerce described herein.

19. Plaintiff has been prevented from proceeding with construction of the additional medical-surgical hospital beds long ago announced and planned for by plaintiff, and now authorized by the Certificate duly issued to plaintiff by the North Carolina Medical Care Commission.

20. Plaintiff has expended, and will continue to have to expend substantial sums of money in order to implement its construction of additional medical-surgical hospital beds and, in particular, to resist the bad faith actions by defendants and their co-conspirators designed to effect the goals of the combination and conspiracy, that is, to foreclose the market for medical-surgical hospital services in the Raleigh area to plaintiff and to allocate the same between Rex and Wake (and, to a limited extent which does not affect the allegations of this complaint, among smaller existing facilities).

Damages

21. As a result of the aforesaid combination and conspiracy, plaintiff has expended considerable sums of money which it would not have otherwise been required to spend due to the necessity of overcoming the illegal attempts of the defendants and co-conspirators to deny plaintiff fair access to the Medical Care Commission.

22. Plaintiff has incurred significant direct costs as a result of the delay caused purposely by the defendants and co-con-

spirators in furtherance of the aforesaid combination and conspiracy.

23. Plaintiff has incurred and will incur a loss of revenues that plaintiff could reasonably have anticipated if construction of its additional medical-surgical hospital beds had not been illegally delayed.

24. Plaintiff is unable at this time to state finally the amount of damages sustained and to be sustained by reason of the illegal acts of defendants and their co-conspirators set forth herein. Plaintiff shows that, but for the illegal combination and conspiracy alleged herein, plaintiff would have received its certificate and begun construction of its additional beds at least by March 1, 1972. Plaintiff's best estimate is that, as a result of the delay caused by the illegal combination and conspiracy alleged herein, plaintiff has, as of the date of filing of this lawsuit, suffered damages in the amount of at least $800,652.00.

COUNT II

1. Plaintiff re-alleges and incorporates hereby by reference paragraphs 1 through 24 hereinabove except that, as to Count II, plaintiff names only Rex as defendant.

2. Plaintiff alleges that paid hospital business conducted by non-public hospitals constitutes a separate and distinct line of commerce.

3. All of the acts and incidents set forth in Count I were undertaken at the instigation, and under the direction and control of defendant Rex. Such acts constitute an attempt by defendant Rex to monopolize, and to conspire, with those other persons named as defendants and co-conspirators in Count I, to attempt to monopolize, the paid hospital business conducted by non-public hospitals in the Raleigh area, in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

PRAYER

Wherefore, plaintiff prays:

As to Count I

1. That the Court adjudge and decree that the defendants have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

2. That plaintiff recover three times the damages determined to have been sustained, that is, at least the amount of $2,401,956, and that joint and several judgments be entered herein against the defendants for the amounts determined.

3. That each of the defendants, their successors, assigns, subsidiaries and transferees, and the respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof, or in concert therewith be perpetually enjoined and restrained from in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid conspiracy, and from adopting or following any practice, plan, program or design having a similar purpose or effect.

4. That this Court grant such other, further and different relief as may be deemed just and proper.

5. That plaintiff recover the costs of this suit together with reasonable attorneys' fees.

As to Count II

1. That the Court adjudge and decree that defendant Rex has engaged in an unlawful attempt to monopolize, and to conspire with others to monopolize, in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

2. That plaintiff recover three times the damages determined to have been sustained, that is, at least the amount of $2,401,956, and that judgment be entered against defendant Rex for the amount determined.

3. That defendant Rex, its successors, assigns, subsidiaries and transferees, and its officers, trustees, agents and employees, and all other persons acting or claiming to act on its behalf or in concert with it be perpetually enjoined and restrained from in any way continuing the said attempt to monopolize, or to conspire to do so.

4. That this Court grant such other, further and different relief as may be deemed just and proper.

5. That plaintiff recover the costs of this suit together with reasonable attorneys' fees.

JOHN R. JORDAN, JR.

Of Counsel:

JORDAN, MORRIS and HOKE
Post Office Box 709
Raleigh, North Carolina 27602
Telephone: (919) 828-2501

JOHN K. TRAIN, III
ROBERT W. MILLER

Of Counsel:

ALSTON, MILLER & GAINES
12th Floor, C&S Bank Building
Atlanta, Georgia 30303
Telephone: (404) 577-8600

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

MOTION
To Dismiss for Lack of Jurisdiction Pursuant to Rule 12(b) (1) (2) and for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b) (6)

(Filed December 29, 1972)

Now comes the Defendant, George Stockbridge, and respectfully moves that the complaint in this cause be dismissed pursuant to Rule 12(b) of the Rules of Civil Procedure and respectfully shows unto the Court as follows:

Motion to Dismiss for Lack of Jurisdiction

1. The Defendant, George Stockbridge, respectfully contends that the complaint in this cause be dismissed pursuant to Rule 12(b) (1) and (2) in that this Court lacks jurisdiction over the subject matter and person.

2. This action was instituted by the plaintiff pursuant to Section 4 of the Clayton Act, Title 15 U. S. C., Section 15, for alleged violations of the anti-trust provisions under the Sherman Act and Clayton Act.

3. The United States District Court has exclusive jurisdiction of violations under the anti-trust laws; provided, however, to maintain said action under Title 15 U. S. C., Section 15 (Clayton Act, Section 4), the alleged acts complained of must re-

strict the flow of interstate commerce and adversely affect interstate commerce.

4. The acts as alleged by the plaintiff fail to meet the jurisdictional requirement in that the same do not directly, substantially, and adversely affect interstate commerce.

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

1. The Defendant, George Stockbridge, respectfully contends that the complaint in this cause fails to state a claim upon which relief can be granted and the same should be dismissed pursuant to Rule 12(b) (6).

2. The Defendant, George Stockbridge, further shows unto the Court:

a. The acts as alleged in the complaint do not constitute violations under Sections 1 and 2 of the Sherman Act (15 U. S. C., § 1 and 32) and under Section 16 of the Clayton Act (15 U. S. C. § 26).

b. The plaintiff filed its application for a certificate of need for medical care facilities with Health Planning Council of Region "J", pursuant to Article 21 of the North Carolina General Statutes. The Defendant, George Stockbridge, has been the Executive Secretary of Health Planning Council and was at all times acting in this capacity and in accordance with the policy of the Board of Directors of Health Planning Council Region "J."

Wherefore, the Defendant, George Stockbridge, Prays the Court that this action be dismissed on the grounds that the Court lacks jurisdiction over the subject matter and person and

that the plaintiff has failed to state a claim upon which relief can be granted.

Respectfully submitted this 29th day of December, 1972.

HOFLER, MOUNT, WHITE & LONG
By LILLARD H. MOUNT
Attorney at Law
P. O. Box 3871
Durham, North Carolina 27702
919-682-5606

ROBERT MORGAN
Attorney General
By (MRS.) CHRISTINE Y. DENSON
Assistant Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

(Title Omitted in Printing)

MOTION TO DISMISS COMPLAINT FOR LACK OF REQUISITE EFFECT UPON INTERSTATE COMMERCE

(Filed January 2, 1973)

Pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, defendants Trustees of the Rex Hospital ("Rex Hos-

pital"), Joseph Barnes, its Administrator, and Richard Urquhart, Jr., a trustee of Rex Hospital, move for an order dismissing this action for failure to allege facts sufficient to state the requisite effect upon interstate commerce as required under the Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1 and 2. In order to obtain jurisdiction under the Sherman Act, plaintiff must allege facts sufficient to show that the conspiracy and other restraints complained of affected the flow of interstate commerce in a direct and substantial way. This plaintiff has not done. Rather, the complaint alleges facts which at most describe a situation purely local and intrastate in dimension, with only incidental and remote effect on interstate commerce. The prevailing case law is legion that such an alleged fact situation is nowhere near sufficient to state a claim under the Sherman Act. This is particularly true in the area of hospital services.

We hasten to point out to the Court the highly questionable nature of the cause of action alleged by plaintiff and the distinct possibility of summary judgment in favor of defendants on the merits of the claim. Only this year the Supreme Court of the United States has reaffirmed the right of groups, free from the antitrust laws, to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). However, at this juncture we believe the first question for Court determination should be the interstate commerce issue. If that issue disposes of the litigation, and we believe it will, there will be no need to become involved in other dispositive questions.

The accompanying memorandum of law sets forth the pertinent case law, which is believed to be highly compelling in support of this motion to dismiss. For the purposes of this motion, Rex Hospital, Barnes and Urquhart will accept the jurisdictional allegations of the complaint as true (para. 14).

For the foregoing reasons and those set forth in the accompanying memorandum, the Court is urged to grant this motion and dismiss the complaint. Oral argument is requested.

Respectfully submitted

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P.O. Box 2058
Raleigh, North Carolina 27602
919/828-4481

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P.O. Box 750
Raleigh, North Carolina 27602
919/832-6463

RAY S. BOLZE
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
202/872-8800

Attorneys for Rex Hospital; Joseph Barnes; Richard Urquhart, Jr.

Dated: December 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

PLAINTIFF'S FIRST AMENDMENT TO COMPLAINT

(Filed January 29, 1973)

Plaintiff hereby amends its Complaint as follows:

1

Plaintiff amends paragraph 14 of its Complaint by striking therefrom said paragraph and inserting in lieu thereof a new paragraph 14 to read as follows:

"14

a

Hospital Building Company is a wholly-owned subsidiary of Charter Medical Corporation ("Charter"), a Delaware corporation with offices and principal place of business in Macon, Georgia. Charter owns, directly or indirectly, and operates nine medical-surgical hospitals (in addition to Mary Elizabeth) located in the States of Georgia, Virginia, Louisiana and Nevada. Charter manages medical-surgical hospitals in the States of Georgia, Texas and Virginia, and in Puerto Rico. Charter purchased all of the outstanding stock of Hospital Building Company in December, 1970, with the intention of causing the relocation and expansion of Mary Elizabeth Hospital as set forth herein.

b

Hospital Building Company, in the course of its business of operating Mary Elizabeth Hospital, has purchased on a regular and continuing basis, and will continue so to purchase in the future, substantial amounts of goods including supplies and medicines, from vendors in states other than North Carolina. Approximately eighty percent (80%) of the goods purchased by Hospital Building Company are purchased pursuant to national contracts negotiated by Charter with vendors, which contracts establish the terms of purchase for Charter's various operations. In 1972 (excluding food and other goods for its kitchen operation) Hospital Building Company purchased supplies in the amount of $112,846, including supplies for its radiology operation ($29,000), medical laboratory ($23,000), electrocardiology operation ($26,000) and pharmacy ($33,-000). When Mary Elizabeth Hospital is relocated and expanded, such purchases will continue and increase substantially.

c

Hospital Building Company regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business. Hospital Building Company and Charter have entered into a management agreement whereby Charter provides to Hospital Building Company various management services in return for payment of a fee to it by Hospital Building Company. The amount of such fee is based upon the gross revenues of Hospital Building Company. During the 1972 fiscal year, such fee was approximately $36,000. When Mary Elizabeth Hospital is relocated and expanded, the amount of such fee will increase substantially.

d

Because of its location and other factors, a substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals there. Hospital Building Company competes for the paid hospital business of such persons.

e

In the case of many patients at Mary Elizabeth Hospital, and at the other two paid hospitals in the Raleigh area, payment of the fees charged patients by the hospitals for goods and services, is regularly made by insurance companies and other providers located outside the State of North Carolina. A substantial number of patients at Mary Elizabeth Hospital are covered by federal programs, including Medicare and Medicaid, providing for payment in whole or in part of some or all of the charges made to them for goods and services by Mary Elizabeth Hospital. In its 1972 fiscal year, charges for goods and services provided patients by Mary Elizabeth Hospital were made to the following sources of payment and payment received from them in whole or in part:

Source	% of Total Charges
1. Private insurance programs (including Blue Cross)	56.1%
2. Medicare	36.3%
3. Medicaid	2.1%
4. Direct to patient	5.5%

f

The combination and conspiracy complained of herein is directed, among other things, at plans of Hospital Building Company and Charter to relocate Mary Elizabeth Hospital into a new, enlarged hospital facility and expand its capacity from 49 patient beds to approximately 149 patient beds. The cost of such relocation and expansion is estimated to be in excess of $4,000,000. Financing of these costs will be accomplished through one or more loans with one or more lenders located outside the State of North Carolina. Repayment of 'permanent' financing will extend substantially into the future, requiring regular remittances by Hospital Building Company to a lender outside the State of North Carolina and various activities by such lender in North Carolina during such period of time. The new hospital facility will be constructed, in large measure, from goods, supplies and materials which have moved in interstate commerce, and by persons engaged in interstate commerce.

g

Mary Elizabeth Hospital is accredited by the Joint Commission on Accreditation of Hospitals, a national organization which promulgates standards for the operation of hospitals.

In its operation of Mary Elizabeth Hospital, Hospital Building Company is doing business in interstate commerce. The combination and conspiracy complained of herein has a substantial and direct effect on interstate commerce."

This 29 day of January, 1973.

Respectfully submitted

John R. Jordan, Jr.
John K. Train, III
Robert W. Miller
Timothy S. Perry
Attorneys for Plaintiff

Of Counsel

Jordan, Morris and Hoke
Post Office Box 709
Raleigh, North Carolina 27602
(919) 828-2501

Of Counsel

Alston, Miller & Gaines
1200 Citizens and Southern
National Bank Building
Atlanta, Georgia 30303
(404) 577-8600

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AMENDMENT TO MOTION TO DISMISS COMPLAINT FOR LACK OF REQUISITE EFFECT UPON INTERSTATE COMMERCE

(Filed February 20, 1973)

Defendants, Trustees of Rex Hospital, Joseph Barnes, and Richard Urquhart, Jr., hereby amend their motion to dismiss the complaint which was served December 28, 1972 so as to include within the scope of such motion plaintiff's "First Amendment to Complaint." Based upon the arguments set forth in defendants' Supporting Memorandum served December 28, 1972 and Reply Brief served this date, as well as the reasons stated in our initial Motion to Dismiss, these defendants hereby move that the Court enter an order pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, dismissing the complaint and amendment to complaint filed herein for failure to allege facts sufficient to state the requisite effect upon interstate commerce, as required under the Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1 and 2.

Respectfully submitted

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
Post Office Box 2058
Raleigh, North Carolina 27602
919/828-4481

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
Post Office Box 750
Raleigh, North Carolina 27602
919/832-6463

RAY S. BOLZE
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
202/872-8800

Attorneys for Rex Hospital; Joseph Barnes; Richard Urquhart, Jr.

Dated: February 17, 1973

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

(Title omitted in printing)

BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF JURISDICTION

(Filed January 29, 1973)

• • • • • • •

[7] II. *Agreement and Citation of Authority*

A. *Summary Treatment by Motion Is Not an Appropriate Means for Determining the "Commerce" Question.*

At the outset, Plaintiff points out that Defendants' attempt to deal with the "interstate commerce" issue by a 12(b)(6) motion is not appropriate. The courts have consistently held that summary treatment (by motion or otherwise) of substantive issues in antitrust cases is improper.

• • • • • • • •

[8] Courts have been particularly reluctant to grant dismissal of antitrust cases on motions directed at the Complaint's allegations of the requisite effect on interstate commerce . . .

• • • • • • • •

The Defendants' motions to dismiss should therefore be denied, if only because they raise questions of fact, not questions of law which could be resolved on the Complaint as it stood when the motions were filed. Plaintiff submits, however, that the motions must be denied when considered in light of the amended Complaint because as a matter of law, there is sufficient impact of the combination and conspiracy alleged on interstate commerce.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title omitted in printing)

**MOTIONS HEARD BEFORE HONORABLE
FRANKLIN T. DUPREE, JR.,
U. S. DISTRICT JUDGE**

Appearances:

For Plaintiff: Timothy S. Perry, Esq., John K. Train, III, Esq., Charles B. Morris, Jr., Esq.

For Defendants: Ray S. Bolze, Esq., John H. Anderson, Jr., Esq., Thomas W. Steed, Jr., Esq., L. H. Mount, Esq., Christine Y. Denson, Esq.

At Raleigh

Feb. 22, 1973

* * * * * * *

[28] The cases he cites refer to fortuitous contacts or fortuitous effects. I do not believe that your Honor will find in the allegations we have made in the amended complaint anything that is fortuitous or incidental or otherwise than part of the regular and continuing course of business conducted by this plaintiff. This plaintiff regularly purchases supplies to run its business. A hospital does not just consist of physicians coming in and treating patients. A hospital is perhaps thought of to some extent in the nature of a hotel or motel. Such institutions have been held to be in interstate commerce. Restraints against them have been held to adversely affect interstate commerce for purposes of application of the Sherman Act. When a doctor comes to the hospital, he comes to use equipment,

he comes to prescribe and give medicines, he comes to look at patients and take care of them who are in beds that have all been purchased, as alleged here by this plaintiff, in the regular course of its business from interstate commerce sources. **[29]** The Court: Do you believe that a business can be engaged in interstate commerce and yet be restrained in some aspect of its business which is not interstate commerce and therefore not have available to it the provisions of the Sherman Act?

Mr. Train: I would think so, your Honor. I think Mr. Bolze description of his activities this morning with respect to the local restaurant; perhaps he stated it a little bit too baldly; I'm sure it will come as a surprise to most public restaurants to find that they're not in interstate commerce for the purpose of some acts of the federal legislation.

The Court: I know they are. You find that out in the civil rights aspect of that litigation.

Mr. Train: That's entirely correct. But I could conceive of local businesses who for one reason or another would be subject to federal regulation in one form or another——

The Court: Well, more specifically, here now, when you are buying your supplies and your X-ray equipment and so forth from out of state **[30]** you are to some extent engaging in interstate commerce, but when you get all of that equipment, material and supplies assembled, then you provide a service for a local person; is that interstate commerce?

Mr. Train: We feel both that that is interstate commerce and we also feel that whether or not that is interstate commerce as such, that where there is a conspiracy that prevents us from providing those services, that there is certainly a substantial adverse effect on interstate commerce.

The Court: But what you complain of here is not the actual commerce with some out of state supplier or lender or

patient or something but your ability to expand an existing business, triple it I believe you say, in order to provide more services, and it is that thwarting of your intention and your desire to expand your business that has been the subject of their alleged restraint, is it not?

Mr. Train: That's correct.

* * * * * * * *

[34] * * * is correct, then the antitrust laws could never remedy a conspiracy aimed at the entry of a new competitor into the market, which I believe is one of the things the antitrust laws are certainly designed to expedite.

So, we believe that this case, looked at with respect to the particular facts alleged—and we realize that we will be put to the proof of these facts as we go down the road, and of course, jurisdiction as a question could be raised at any time. But we feel that based on the facts we've alleged in this particular case that we come within the cases discussing the requisite involvement of interstate commerce, so as to properly invoke the jurisdiction of the federal court under the Sherman Act.

The Court: Thank you, Mr. Train. Would you like to reply to that, Mr. Bolze?

Mr. Bolze: Yes, sir, briefly, your Honor.

First, as to the comments of Mr. Train, he said the matters that they would plan to prove on trial, to show the requisite effect upon interstate commerce are as alleged **[35]** in the amended complaint, and that they could prove those facts. Well, that's exactly our point in moving for dismissal on the pleadings. That is our understanding; that they have nothing additional to show. They've not come up with any allegations that we've restrained any interstate trade coming in.

The Court: I'm inclined to be with you on the argument of prematurity. I think it's just as good time as any to get this settled.

Mr. Bolze: I know my clients don't want to spend any more money than they have to in a case like this and we think a case like this can go on the pleadings.

The second point, your Honor, is the fact that it's interstate commerce because Mr. Train says the doctor comes in and treats a patient by using an X-ray machine which at one time or other was purchased through interstate trade or commerce. To me it's just incomprehensible; in that case every piece of equipment would be used in interstate commerce. I just cannot fathom that. That is just not in the cases. He says if he treats **[36]** a patient lying on a bed which came at one time through interstate commerce, that's in interstate commerce. I just cannot accept that. That puts everyone in interstate commerce.

The courts have said that is not the way the Sherman Act is to be used. It's to relate to matters in interstate commerce that would substantially affect it. Certainly, treating a patient lying on a bed that may have come by interstate manufacturer through a distributor, is not being in interstate commerce or that doctrine. The Supreme Court has so held and so have the courts of appeal.

Finally, your Honor, as to payments by Blue Cross and Medicaid and Medicare, the allegations they have and the substantial dollar amounts, Blue Cross and Blue Shield are state, not across state lines, these are state agencies, Medicare, Medicaid are paid from the state agencies; they may be indirectly funded by the federal government, but if you take that approach, as counsel here suggested to me, our greenbacks are * * *

* * * * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Hospital Building Company,
Plaintiff,
vs.
Trustees of the Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,
Defendants.
Civil No. 4048

ORDER

(Filed March 23, 1973)

The plaintiff, a North Carolina corporation, which operates a private hospital for profit in the City of Raleigh, has brought this civil antitrust action against the defendant Rex Hospital, also located in Raleigh, the defendant, Joseph Barnes, its administrator, and Richard Urquhart, Jr., one of its trustees. The defendant, George Stockbridge, is executive secretary of the Health Planning Council for central North Carolina. Jurisdiction has been invoked under the Sherman Act, 15 U.S.C. §§ 1 and 2. Alleging violations of these statutes, the complaint charges defendants, and certain other named "co-conspirators" not made parties to the action, with having "engaged in an unlawful combination and conspiracy in unreasonable restraint of . . . trade and commerce in the furnishing of medical-surgical hospital services" and "an attempt by defendant Rex to monopolize, and to conspire . . . to attempt to monopolize, the paid hospital business conducted by non-public hospitals in the Raleigh area . . ." The case is before the court on the motions

of the defendants to dismiss for lack of subject matter jurisdiction and the failure of the complaint, as amended, to state a claim upon which relief can be granted.

Central to defendants' motions is the contention that the facts alleged by plaintiff do not show that the alleged wrongdoing on the part of defendants has affected interstate commerce in a direct and substantial way necessary to invoke the provisions of the Sherman Act. To meet the challenge of these motions the plaintiff filed an amendment to its complaint alleging with more specificity the scope of its activities in interstate commerce which the alleged wrongdoing of defendants is affecting. The allegations of the amendment to the complaint may be briefly summarized as follows:

1. Plaintiff is the wholly-owned subsidiary of a Delaware corporation which owns, directly or indirectly, and operates or manages medical-surgical hospitals in five states and Puerto Rico.

2. Plaintiff purchases on a regular and continuing basis substantial amounts of goods, supplies and medicines from vendors in states other than North Carolina.

3. Plaintiff regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business.

4. A substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals.

5. Plaintiff receives a substantial part of its revenue from medicare, medicaid and hospital insurance benefits from insurance companies located outside North Carolina.

6. The planned expansion of plaintiff's present facilities will cost in excess of four million dollars which will be fi-

nanced through one or more lenders located outside North Carolina.

7. Plaintiff's present hospital is accredited by the Joint Commission on Accreditation of Hospitals,. a national organization which promulgates standards for the operation of hospitals.

These various activities show unmistakably that the plaintiff engages in transactions in interstate commerce, but it does so only incidentally to the conduct of its principal business which is that of operating a hospital in Raleigh, North Carolina. All of the cases involving hospital and medical services seem to indicate that this is strictly a local, intra-state business. *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959); *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson v. Lull*, 145 F. Supp. 134 (N.D.Ill. 1956); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952). Yet it is the conduct of this business of the plaintiff upon which the alleged unlawful restraint of defendants is operating, not those interstate activities which plaintiff finds necessary or expedient in the conduct of its hospital business.

But,

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

The conclusion is that the conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it

affect interstate commerce. The Sherman Act has therefore not been properly invoked, and the court is without subject matter jurisdiction. *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269 (2nd Cir. 1964).

Accordingly, it is now

Ordered that the motions of the defendants are allowed and the action is dismissed.

/s/ F. T. DUPREE, JR.
United States District Judge

March 23, 1973.

OPINION

(Filed February 6, 1974)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued December 6, 1973 Decided: February 6, 1974

Before Bryan, Winter and Widener, Circuit Judges.

John K. Train, III (John R. Jordan, Jr., Timothy S. Perry, Jordan, Morris and Hoke, Alston, Miller & Gaines, on brief) for Appellant; Ray S. Bolze (Thomas W. Steed, Jr., John H. Anderson, John R. Fornaciari, Allen, Steed & Pullen, Smith, Anderson, Blount & Mitchell, Howrey, Simon, Baker & Murchison, on brief) for Appellees; (Carl Weissburg, Lawrence E. Mindell, Weissburg, Jacobs and Gerst, on brief for Amicus Curiae Federation of American Hospitals).

Per Curiam:

After oral argument, review of the briefs and review of the record, we are not persuaded that the district court was in error when it concluded that the effect of defendants' alleged conspiracy in restraint of trade was neither to restrain activities in the flow of interstate commerce nor to restrain local activities having a substantial effect on interstate commerce.

AFFIRMED.

ORDER

(Filed June 11, 1974)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Order

The petition for rehearing of Hospital Building Company, containing a suggestion for rehearing in banc, has been referred to the entire court. A poll on the suggestion for rehearing was requested and a majority of the judges eligible to vote have voted to grant rehearing in banc.

Accordingly, it is Ordered that the motion for rehearing in banc be, and it is hereby, granted; the previous opinion of the panel is withdrawn; and the Clerk is directed to restore the case to the hearing calendar and to fix a date for rehearing in banc during a regular session of the court as soon as practicable. The Clerk is further directed to fix a schedule for the filing of supplemental briefs if either of the parties desires to file the same.

For the Court:

/s/ HARRISON L. WINTER
United States Circuit Judge

OPINION

(Filed February 18, 1975)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,

Appellant,

Federation of American Hospitals,

Amicus Curiae,

versus

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

(Argued October 3, 1974 Decided February 18, 1975)

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, and Winter, Craven, Butzner, Russell, Field, and Widener, Circuit Judges, sitting en banc.

John K. Train, III, and Timothy S. Perry (Jordan, Morris and Hoke and Alston, Miller and Gaines and John R. Jordan, Jr., on brief) for Appellant; (Carl Weissburg, Lawrence E. Mindell and Weissburg, Jacobs and Gerst on brief for Amicus Curiae Federation of American Hospitals); Ray S. Bolze and John H. Anderson (Thomas W. Steed, Jr.; John R. Fornaciari; Allen, Steed and Pullen; Smith, Anderson, Blount and Mitchell; Howrey, Simon, Baker, and Murchison; Lillard H. Mount; Richard M. Hutson, II; and Hofler, Mount, White and Long on brief) for Appellee.

CRAVEN, Circuit Judge:

In this action filed pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, appellant Hospital Building Corporation (HBC) sought treble damages in excess of $2 million and injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The sole question before us is whether the district court erred when it dismissed HBC's amended complaint on the ground that it failed to allege a sufficient nexus with interstate commerce to invoke the Sherman Act.

I

The motion to dismiss was lodged under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Whether termed "lack of jurisdiction over the subject matter" or "failure to state a claim upon which relief can be granted," the result of such a motion, if granted, is the same. Dismissal under Rule 12, the lineal descendant of demurrer, is, of course, merely a decision on the pleadings. For that reason, such motions "are granted sparingly and with caution." 5 Wright & Miller, Federal Practice and Procedure, § 1349, at 541. Especially is this so in antitrust cases "because it may be difficult to plead more precisely the effects on interstate commerce until discovery has been had." *Chapiewsky v. G. Heileman Brewing Co.*, 297 F. Supp. 33, 38 (W.D. Wis. 1968). Generally, we think that where a question of fact arises as to the substantiality of the impact of a local restraint on interstate commerce, the question should not be decided on a motion to dismiss. *Donlan v. Carvel*, 209 F. Supp. 829, 831 (D. Md. 1962). Our task would be much simpler

had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extra time and effort would have been worthwhile.

Whether the complaint was dismissed for lack of subject matter jurisdiction *or* failure to state a claim upon which relief could be granted is not clear. Since Congress specifically has conferred jurisdiction of Sherman Act claims (15 U.S.C. §§ 15 and 26), we think it the better analysis to treat an insufficient plea of effect upon interstate commerce as a failure to state a claim upon which relief can be granted rather than lack of jurisdiction (in the sense of power) over the subject matter. So viewed, our distaste for judgment on the pleadings is even greater, for a motion to dismiss for failure to state a claim "is viewed with disfavor and [should be] rarely granted." 5 Wright & Miller, *supra*, § 1357 at 598.

Nevertheless, we have concluded to affirm. That we do so should be taken by the bar and the district judges as a rare exception to prove the rule that judgments of dismissal on the pleadings in antitrust cases will ordinarily be reversed.

II

HBC operates in Raleigh, North Carolina, a 49-bed proprietary hospital, Mary Elizabeth Hospital, which offers general medical-surgical hospital services to the public. The appellees, referred to by HBC in its brief and hereinafter by us as "the Raleigh Group," are a North Carolina corporation that runs a hospital in competition with Mary Elizabeth in Raleigh and various individuals involved in the provision of medical-surgical hospital services in Raleigh. HBC alleged below that, beginning at least as early as 1970 and continuing through the present, the Raleigh Group together with others not parties to this suit

have engaged in a conspiracy aimed at controlling the number of hospital beds, allocating customers (hospital patients), and otherwise exercising unreasonable restraints of and monopolizing the market for medical-surgical hospital services in "the Raleigh area," defined as "the area comprising Wake County, in the State of North Carolina."

HBC professed to have discovered the conspiracy in late 1971 when it undertook to relocate Mary Elizabeth and expand it from 49 to 140 beds. According to HBC the Raleigh Group and their coconspirators devised a scheme involving bad faith efforts to block authorization of the expansion,[1] tactics to hold up implementation of HBC's plans once authorization was gained, and finally malicious instigation of adverse publicity and general public antipathy. HBC alleged that the scheme has delayed expansion of Mary Elizabeth, and asked as damages treble the amount of direct costs and loss of revenue attributable to the delay. HBC also sought injunctive relief against a continuation of the alleged conspiracy. Because we conclude that the district court was correct in finding that even if HBC proved all of its factual allegations it still would have shown an insufficient connection with interstate commerce to invoke the Sherman Act, we affirm.

III

An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the

[1] At the time HBC sought authorization, North Carolina law required a certificate of need prior to hospital expansion. *See* In Re Certificate of Need for Astron Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the requirement was held to violate the constitution of North Carolina.

conduct, though wholly intrastate, had a substantial *effect on* interstate commerce.

Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974) (emphasis added). *See also Goldfarb v. Virginia State Bar*, 497 F.2d 1, 16 (4th Cir.), *cert. granted*, 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974) (No. 74-70); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269, 271-72 (2d Cir. 1964). Within this traditional analytic framework the question for decision is whether the conspiracy described in HBC's complaint has either directly restrained *or* substantially affected interstate commerce.

IV

There is little basis for HBC's assertion that the alleged conspiracy acts directly in interstate commerce. The Raleigh Group is concerned exclusively with restraining Mary Elizabeth's provision of hospital services and with controlling the market for such services in the Raleigh area. The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952). Therefore, anticompetitive conduct aimed at the provision of such services necessarily acts *directly* only upon *intrastate* commerce. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952); *Elizabeth Hospital, Inc. v. Richardson, supra; Riggall v. Washington County Medical Society*, 249 F.2d 266, 268 (8th Cir. 1957); *cert. denied*, 355 U.S. 954 (1958); *Spears Free Clinic v. Cleere, supra.*

HBC's argument that the Raleigh Group's anticompetitive conduct occurred "in commerce" amounts to this: (1) Mary

Elizabeth, and hospitals in general, have become substantially enmeshed in the interstate commerce network through their use of interstate communications facilities, their subjection to extensive federal regulation, their purchases of materials and services from out-of-state, their treatment of patients from other states, and their financial arrangements with national health insurers and government welfare programs; (2) the conspiracy directly affected Mary Elizabeth; therefore, the conspiracy, by acting upon a hospital so entwined in interstate commerce, acted directly upon interstate commerce. We accept the premises of the syllogism but reject the conclusion.

It is settled that the "in commerce" test is not whether the conduct complained of is aimed at a business engaged in interstate commerce, but whether the conduct complained of acts directly upon the interstate aspects of such a business. *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-34 (1947); *Sun Valley Disposal Co. v. Silver State Disposal Co., supra*, 420 F.2d at 343; *Liberthal v. North Country Lanes, Inc., supra*, 332 F.2d at 271; *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306, 308-09 (4th Cir. 1962); *cert. denied*, 372 U.S. 911 (1963); *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961). Here, no matter how entwined in our increasingly national economy Mary Elizabeth and other Raleigh area hospitals may be, the fact remains that the conspiracy complained of directly affected only one aspect of those hospitals' businesses, namely the provision of surgical-medical hospital services in the Raleigh area. And the provision of such services remains what it always has been: a local, intrastate activity, not interstate commerce.

In its argument that "in commerce" jurisdiction exists HBC relies heavily on language from *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973). We cannot see the relevance of that case to our situation for purposes of the "in commerce" test. The court in

Rasmussen indicated, although it did not decide conclusively, 472 F.2d at 524-25, that the "in commerce" test was met by a restraint on the intrastate sale of a filled-milk product called "Go" which was manufactured instate from ingredients all but one of which originated out of state. The court was able to suggest that the restraint acted directly upon the flow of commerce formed by "Go" and its ingredients because—as the court said—"for all practical purposes, the out-of-state ingredients *are* 'Go.' " *Id.* at 525 (original emphasis). *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Here, in contrast, there is no out-of-state product that is passed to patients in an economic transaction as a dominant ingredient of hospital services in the Raleigh area. Probably the only out-of-state products sold by Mary Elizabeth are drugs, and they are sold not so much as part of the interstate trade in drugs, but rather as a small and inseparable component of the *service* provided by Mary Elizabeth. This case is therefore different from *Northern California Pharamaceutical Ass'n v. United States*, 306 F.2d 379, 386-87 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962), where the court found sales of drugs by pharmacies part of the interstate commerce flow of drugs: there, the drugs in their flow from manufacturer to ultimate consumer never lost their character as both a *product* and a distinct line of commerce.

V

It is not so easy to decide the result under the second, or "affecting commerce," branch of the analysis. Here the fact that the Raleigh Group's conduct acted directly only upon a local market and a local aspect of Mary Elizabeth's business is not dispositive. The question remains whether that conduct, though local in its immediate motive and effect, nevertheless so substantially[2] affects interstate commerce as to invoke the Sherman

[2] The volume, amount, or quantity of interstate commerce involved is irrelevant under the "in commerce" test, but may be crucial under the "affecting commerce" test. *See* Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391 n.6, 395 (4th Cir. 1974); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526-28 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973); Las Vegas Plumbers Merchant Ass'n v. United States, 210 F.2d 732, 739-40 n.3 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954); United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1065-66 (S.D. Ohio 1971). As in other contexts, *see e.g.*, United States v. LeFaivre, No. 74-1239 (4th Cir. Dec. 4, 1974), the Congress utilized its recognized power over commerce to reach detrimental activity. "The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . ." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). Thus if anticompetitive conduct occurs *in* commerce, to whatever degree, the Sherman Act is triggered. But if anticompetitive conduct occurs wholly *intra*state, Congress has left to the courts to decide whether such conduct "is sufficiently related to interstate commerce to justify the prohibition of that conduct as 'necessary and proper' to the protection of interstate commerce against the presumed economic burdens resulting from the anti-competitive practices." Rasmussen v. American Dairy Ass'n, *supra*, at 524.

Act. That can only be a matter of degree, and such matters are never clean:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Association, supra, 472 F.2d at 526.

HBC suggests several ways in which interstate commerce has been affected by the Raleigh Group's thwarting of the Mary Elizabeth expansion. Neither the hospital's interstate purchases of supplies and equipment,[3] its billings to national insurance

[3] Mary Elizabeth's purchases totalled $112,846 in 1972, 80 percent of which sum was paid pursuant to national contracts negotiated by HBC's parent corporation.

companies and the federal government,[4] nor its purchases of management services from its parent corporation[5] have increased as they would were the hospital to expand. And the $4 million cost of expansion was to be financed by non-North Carolina lenders, so that substantial interest payments would flow across state lines.

Aware that such decisions should be exercises of reasoned economic judgment rather than applications of mechanistic formulae, *see Rasmussen v. American Dairy Association, supra,* 472 F.2d at 523, we conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce.[6] Although not controlling, this factor is relevant to the issue of substantiality. *See, e.g., Spears Free Clinic v. Cleere, supra,* 197 F.2d at 127; *Marstion v. Ann Arbor Property Managers (Management) Association,* 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam,* 422 F.2d 836 (6th Cir.), *cert. denied,* 399 U.S. 929 (1970). More-

[4] Such billings represented approximately 95 percent of Mary Elizabeth's total billings in 1972.

[5] $36,000 in 1972. HBC's parent corporation was incorporated and is located outside of North Carolina, so that the purchase of services can be deemed interstate.

[6] An example of anticompetitive conduct that is aimed at a local market and yet directly and purposefully affects interstate commerce is that in United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945). Liquor dealers in Colorado conspired to fix retail liquor prices within the state, a purely local aim. But as a means of accomplishing their purpose they agreed both to compel out-of-state liquor producers to enter into fair trade contracts and to boycott those producers who failed to do so. The Supreme Court in finding Sherman Act jurisdiction focused upon this tactic of the conspirators, stating that "[w]hatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado." 324 U.S. at 298.

over, when the various economic consequences are sorted out and considered in the perspective of their respective markets,[7] it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected. In short, we are unconvinced that the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act. *Cf. Page v. Work, supra,* 290 F.2d at 332-33.

In deciding that there is here insufficient impact on interstate commerce to invoke the Sherman Act we do not overlook *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3d Cir. 1973). The Third Circuit in that case found jurisdiction over an alleged conspiracy of Blue Cross and a hospital planning agency aimed at manipulating the Greater Philadelphia hospital services market to Blue Cross's benefit. The court based its finding on the fact that the conspiracy, if successful, could shut down many of the approximately 100 hospitals in the Greater Philadelphia area, which could affect as much as $23 million per year in interstate shipments of supplies. According to the court, and we agree, this potential effect upon the traffic in out-of-state goods was "substantial enough" to invoke the Sherman Act. 490 F.2d at 53.

We think *Doctors, Inc.* is distinguishable. There is simply no significant comparison between the effect on commerce of one small hospital's delayed expansion, especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area. The *Doctors, Inc.* court carefully

[7] *Cf.* Rasmussen v. American Dairy Association, 472 F.2d 517, 527 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); "The basic issue . . . is the extent to which a prohibition of the defendants' specific conduct is justifiable as a means of protecting *the specific line of interstate commerce involved.*" (emphasis added).

distinguished its situation from *Lieberthal v. North Country Lanes, Inc., supra,* and *Page v. Work, supra,* referring to them as "good law" and "the kinds of cases which remain beyond the reach of interstate commerce jurisdiction." 490 F.2d at 54. We agree and conclude that this case resembles *Lieberthal* and *Page* more than *Doctors, Inc.*[8]

Having quite plausibly, we think, fit this case into its appropriate pigeonhole entitled "nonsubstantial or de minimis effect on interstate commerce," we are left with a feeling of dissatisfaction. Labeling one case "de minimis" and another as "affecting commerce" does achieve a result but is not otherwise very revealing. Anyone who studies decisions applying the "affecting commerce" test will be struck by the absence of a clear line, much less a bright one, between those effects that are deemed substantial and those that are characterized as "indirect," or "fortuitous," or "insubstantial," or "de minimis," or "sporadic," or "incidental." In any area so very gray it is absurd to suppose that we or any other court can precisely count up the tons of plaster, bottles of liquor, or quantity of proprietary drugs sufficient to cross the line of substantiality. Increasingly, intrastate economic conduct affects interstate commerce due to the interdependence of all segments of our national economy. Whether or not "de minimis" has ever been an effective litmus for application of the Sherman Act, we doubt that it now is, and we are concerned that conventional impact analysis may sometimes conceal rather than reveal the true rationale of decision.

---

[8] In *Lieberthal* the conspiracy was aimed at preventing the opening of one bowling alley, as here it is aimed at preventing expansion of one hospital. In *Page* the court found that a conspiracy to control legal advertising in a local market would not substantially affect commerce in newsprint and other products, since by far the major consumers of such products remained untouched by the conspiracy; here, as noted in the body, the failure of Mary Elizabeth to expand could have no noticeable detrimental effect on the various lines of commerce suggested by HBC.

Rather than attempt a quantitative measurement of interstate involvement, we should, perhaps, consider instead the real danger, in a practical sense, of anti-competitive conduct to the flow of commerce, or the potential destructive power of a conspiracy. It seems to us that courts have been doing that for a long time without necessarily saying so. Such an approach is implicit in the format and choice of words of Mr. Justice Black in *United States v. Employing Plasterers Ass'n,* 347 U.S. 186 (1954). The opinion runs only three pages. The approach is a sweeping one suggesting indignation that a local group of people were "able to *dictate* who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all." 347 U.S. at 189 (italics added). Such restraints are characterized as capable of causing "unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois." *Id.* Notable by its absence is any quantitative analysis. Omitted is any detailed narrative of the type of commerce involved. Instead there is simply a note of impatience that any district judge could possibly have dismissed a Sherman Act complaint that alleged defendants' power to *control* the intrastate market.

Similarly, in *Burke v. Ford,* 389 U.S. 320 (1967), the Supreme Court peremptorily reversed a court of appeals in a two-page per curiam. The economics of the case and description of the commerce involved were reduced to a footnote. The Court focused not on how many bottles of bourbon went from place to place but on its apprehension that this *intra*state conspiracy ould "invariably reduce competition" and cause a price in-.ease. 389 U.S. at 321.

The evil of monopoly power is the theme of both *Employing Plasterers* and *Burke.* Not one word is said about whether the anticompetitive conduct substantially *or* insubstantially affects interstate commerce.

In our case there is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that it can do any more than delay, at most, whatever expansion seems economically wise to the plaintiff. In *Doctors, Inc.*, on the other hand, the plaintiffs alleged that defendants had the power to shut down a hundred hospitals. Thus the real difference between our case and *Doctors, Inc.* may be not so much the quantitative difference in effect on interstate commerce as the dramatic difference in anticompetitive *power*—the danger Congress sought to guard against. Viewed in such a manner the cases seem more persuasively different than if simply stuffed into their respective pigeonholes of insubstantial and substantial impact on interstate commerce.

AFFIRMED.

ADDENDUM

On December 17, 1974, after the preparation of the opinion in this case, the Supreme Court released its decision in *Gulf Oil Corp. v. Copp Paving Co.*, No. 73-1012. Mr. Justice Powell's opinion for the Court notes that the grant of certiorari was limited to questions arising under the Clayton and Robinson-Patman Acts. What is said about the Sherman Act, by way of comparison with those Acts, is not new, slip opinion at 7-8. Although dictum as to the Sherman Act, we think language on page 12 of the slip opinion is consistent with our belief that problems of application of trade control statutes cannot be solved by counting units of merchandise.

> The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national market place. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets.

Winter, Circuit Judge, dissenting:

Although I concurred in the panel decision affirming the district court's dismissal of the amended complaint for failure to allege a sufficient nexus with interstate commerce to sustain a cause of action under the Sherman Act, I am now persuaded that the holding was incorrect. In my view, this amended complaint may not be dismissed *on the pleadings*. Of course, I express no view as to whether the jurisdictional allegations can be proved, but plaintiff should be afforded the opportunity to establish them, if not at trial, at least by a *prima facie* showing to defeat any motion by defendants for summary judgment. I therefore dissent from the majority's affirmance of the district court's dismissal of the amended complaint under Rule 12, F.R.Civ.P.

I

The amended complaint alleges that the action is brought to redress actions of the defendants which constitute "(1) a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and (2) an attempt to monopolize in violation of Section 2 of the Sherman Act. . . ." Before the specific allegations of fact to support these jurisdictional assertions are considered, it is well to consider the scope of application of the Sherman Act. What combinations and conspiracies in restraint of trade and what attempts to monopolize does the Sherman Act prohibit?

There is no novelty in the answer. The settled law was recently restated in *Gulf Oil Corporation v. Copp Paving Company, Inc.* — U.S. —, 43 L.W. 4059 (December 17, 1974). See also *Greeneville Publishing Co. Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 395-96 (4 Cir. 1974). *Gulf Oil* was a case which turned on the jurisdictional requirements of § 2(a) of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. It held that intrastate sales of asphalt for use in the construction of interstate highways were not sales "in commerce" within the ambit of the two Acts. In arriving at this result, the Court reviewed the jurisdictional scope of the two Acts and compared them with the jurisdictional scope of the Sherman Act.[1]

The Court contrasted the "in commerce" concept of the Robinson-Patman Act and the Clayton Act with the jurisdictional scope of the Sherman Act, saying:

> This "in commerce" language differs distinctly from that of § 1 of the Sherman Act, which includes within its scope all prohibited conduct "in restraint of trade or commerce among the several States, or with foreign nations. . . ." *The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of*

[1] The Court noted that § 2(a) of the Robinson-Patman Act forbids "any person engaged in commerce, in the course of such commerce" to make price discriminations "where either or any of the purchases involved in such discrimination are in commerce" and where the effect of the discrimination is to suppress competition "in any line of commerce." It also recited that § 3 of the Clayton Act renders unlawful tie-in sales or exclusive dealing arrangements by "any person engaged in commerce" where the effect "may be to substantially lessen commerce or create a monopoly in any line of commerce," and that § 7, forbidding certain acquisitions, similarly applies to acquirers engaged "in commerce" and prohibits them from acquiring the stock or assets of another corporation engaged "in commerce" where the effect may be substantially to lessen competition "in any line of commerce in any section of the country." It concluded that application of both acts turned on the concept of "in commerce," defined in § 1 of the Clayton Act as "trade or commerce among the several States and with foreign nations . . ."

> *goods.* Moreover, our cases have recognized that *in enacting § 1 Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, *however local its immediate object, a "contract combination . . . or conspiracy" nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. E.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 464 (1949). (Emphasis in text added.) 43 L.W. at 406

With the standard of what the Sherman Act encompasses so clearly defined, I have no hesitancy in concluding that plaintiffs have alleged a sufficient adverse *effect* on interstate commerce to confer jurisdiction on the district court to decide the case on its merits.[2] Under *Gulf Oil*, the test is one of congressional power, and the question is whether Congress could reach the alleged conduct under the commerce power. This is the clear meaning of the statement that ". . . Congress 'wanted to go to the utmost extent of its constitutional power' . . ." The majority holds in effect that the alleged activity is too tenuously related to interstate commerce in a practical sense to justify federal regulation for antitrust reasons. In reaching this conclusion, the majority opinion, as its addendum demonstrates, applies a test designed for determining the jurisdictional ambit of the

[2] Of course, if the rendition of local hospital services was "in commerce," the Sherman Act would clearly apply. But no court has so held, and I think that the majority's conclusion that HBC's activities are not "in commerce" is a correct one.

Clayton and Robinson-Patman Acts. *Gulf Oil*, however, teaches that this test is inappropriate for actions brought under the Sherman Act. In any event, the majority's conclusion is based upon determinations of: (1) the quantitative impact on interstate commerce of the alleged conduct, assessed in terms of precedent sustaining and rejecting complaints, and (2) the qualitative importance of the anticompetitive power alleged in the complaint. By both, I think that proper application of the Sherman Act can be demonstrated.

II

As the majority opinion states, the conspiracy in which defendants allegedly engaged was to prevent Hospital Building Company (HBC) from expanding the capacity of its proprietary Mary Elizabeth Hospital in Raleigh, North Carolina, from 49 to 149 beds. HBC is a wholly-owned subsidiary of Charter Medical Corporation (Charter), which has its principal office in Macon, Georgia, and which, by contract, provides management services to HBC for a fee, including the negotiation of contracts for the purchase of hospital supplies. Suppression of the expansion, it was charged, was to enable defendants to reduce competition in local hospital services by HBC and to enable defendants to control the local hospital service market and thus to allocate it among themselves.

HBC averred that the alleged conspiracy had the following effects on interstate commerce:

> (1) It purchases approximately 80% of its supplies and medicines from vendors in states other than North Carolina. In 1972, excluding food and supplies for its kitchen, it purchased $112,846 of supplies for its radiology, medical laboratory, and electrocardiology operations and its pharmacy. If the hospital were enlarged from 49 to 149 beds, such purchases in interstate commerce would not only continue but increase substantially.
>
> (2) It regularly uses interstate communication, including the mails, to carry out its operations. It pays Charter a fee under the management contract with it. The fee is based on gross receipts, and for 1972 the fee was approximately $36,000. If the hospital were expanded, the amount of the fee would increase substantially.
>
> (3) The fees for hospital services and charges for many of the patients at the existing hospital are paid by insurors and other providers outside of North Carolina. Although not alleged, it may be inferred that if the hospital were expanded fees paid by out-of-state providers would increase substantially.
>
> (4) If the hospital were increased from 49 to 149 beds, the cost thereof would exceed $4,000,000. That cost would be financed by one or more loans with one or more lenders located outside of North Carolina. Payment of principal and interest would extend substantially into the future, and it would require regular remittances to a lender outside of North Carolina.

Conclusorily, HBC alleged that the combination and conspiracy which it charged has "a substantial and direct effect on interstate commerce." I agree. The allegations establish the suppression of an interstate cash flow that would be both substantial and continuing. *Cf.* Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964). I therefore am of the view that jurisdiction was alleged to exist in accord with the test reiterated in *Gulf Oil*.

III

Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F. 2d 48 (3 Cir. 1973), as the majority points out, is a stronger

case than the instant one for concluding that the alleged conspiracy had a substantial effect on interstate commerce and that the Sherman Act applied. In *Doctors*, the named plaintiff purchased $233,430 in supplies from out-of-state suppliers in the test year. Although this figure does not seem to be of any greater magnitude than the projected flow alleged by the plaintiff here, the majority relies on the fact that Doctors' Hospital was typical of the approximately one-hundred other hospitals in the area against all of which the conspiracy was directed, so that it could properly be inferred that interstate purchases of great magnitude were jeopardized. The dictinction, however, is largely without difference. *Gulf Oil* reminds us that, in enacting § 1 of the Sherman Act, Congress was exercising to the *fullest extent* its constitutional power to restrain trusts and monopolies. Thus, it is not only the "big" resultant restraint on interstate commerce that it outlawed; the "little" resultant restraint on interstate commerce is outlawed too so long as a direct adverse effect on interstate commerce is demonstrated and that effect is not *de minimis*.

To be more specific, in *Doctors* the argument was advanced, as urged by the defendants here, that the object of the conspiracy was the intrastate activity of the rendition of hospital services and the effect on interstate commerce was indirect and insubstantial, so that the Sherman Act was inapplicable. In *Doctors*, the argument was rejected in terms which make that case a relevant and persuasive authority for reversing the district court in the instant case. Analyzing Burke v. Ford, 389 U.S. 320 (1967), and U.S. v. Employers Plasterers Ass'n, 347 U.S. 186 (1954), the Third Circuit pointed out that in both the Supreme Court found that a sufficient effect on the flow of out-of-state supplies to local businesses had been alleged to confer Sherman Act jurisdiction. 490 F.2d at 52. More importantly, "there [was not] even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its

inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." 490 F.2d at 53.

I recognize and accept that there are instances in which the effect on interstate commerce of anticompetitive conduct aimed at local activities may be too insubstantial to invoke Sherman Act jurisdiction. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964) (the one-time equipping of a new local bowling alley), and Page v. Work, 290 F.2d 323 (9 Cir. 1961) (alleging conspiracy to control legal advertising, thus causing a newspaper specializing in such advertising to sell its assets to another publisher who continued the paper and continued to buy the same quantity of newsprint from out-of-state sources), are good examples. But the instant case is more like *Doctors* than *Lieberthal* and *Page*. If HBC were permitted to expand, its purchases in interstate commerce and its other interstate activities would increase. It follows that an alleged conspiracy to prevent its expansion has an adverse effect on interstate commerce—not *de minimis*—and should be held to support jurisdiction under § 1 of the Sherman Act.

IV

Similarly, I view the anticompetitive power alleged here as substantial. In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power which "Congress sought to guard against" is merely to disbelieve the plaintiff's allegations. In the Sherman Act, not only the

"evil of monopoly power," but the evil of improper attempts to achieve it are condemned. Where, as here, the out-of-state plaintiffs suggest that local official power and processes were used to delay and deter them, the plaintiffs implicate not only antitrust policy as such, but also the "national market" concerns which animate the commerce clause itself.

HBC's allegations about the flow of financing, management services, and supplies to the hospital from out-of-state have been stated. Additionally, HBC alleges that the overwhelming majority of the fees paid to it come from the federal government and from out-of-state providers. Money thus flows from Blue Cross, private insurers, and the federal government to the hospital and thence to out-of-state suppliers, managers, and financiers. While this construction of the facts may not put HBC's provision of hospital services in the "flow" of commerce as that term is used in the case law, it does make it graphically clear that if HBC is affected, a wide range of interstate connections is affected.

There is, furthermore, clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants.

Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may

be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes.

Judge Butzner and Judge Field authorize me to say that they, too, dissent and concur in this dissenting opinion.